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No. 95-388

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ANTONY BROWN, *et al.*,

Petitioners,

—v.—

PRO FOOTBALL, INC., d/b/a WASHINGTON REDSKINS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION OF THE NATIONAL HOCKEY LEAGUE PLAYERS ASSOCIATION AND THE NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF AMICI CURIAE IN SUPPORT OF PETITIONERS

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November 13, 1995

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Pursuant to Rule 37 of the Rules of this Court, The National Hockey League Players Association ("NHLPA") and The National Football League Players Association ("NFLPA") respectfully move for leave to file the accompanying brief as *amici curiae* in support of the Petition. Petitioners have consented to the filing of the brief in support of the Petition; respondents have not.

INTEREST OF THE NATIONAL HOCKEY LEAGUE PLAYERS ASSOCIATION AND THE NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION

The NHLPA and NFLPA are the sole and exclusive collective bargaining representatives of players in, respectively, the National Hockey League ("NHL") and National Football League ("NFL"). As a result, the NHLPA and NFLPA are regularly engaged in multi-employer bargaining in professional team sports—a process that is being seriously undermined as a result of the decision below.

The NHLPA and NFLPA's analysis of the practical significance and consequences of the decision below thus provides an important perspective which they believe will assist the Court. As the representatives of unionized employees in professional team sports industries, the NFLPA and NHLPA have a unique familiarity with collective bargaining in multi-employer industries and the application of the nonstatutory labor exemption in this context. As set forth in the accompanying amicus brief, the NHLPA and NFLPA are concerned that the decision of the court below will severely damage both labor and antitrust policies and will, if not corrected, signficantly impede the ability of employers and employees in multi-employer industries to reach collective bargaining agreements.

In submitting the accompanying amicus brief supporting the petition for writ of certiorari, the NHLPA and NFLPA wish to explain why, from their perspective, the issues raised by the decision below are of such importance as to warrant certiorari review. The NHLPA and NFLPA believe that this perspective will assist the Court in its consideration of the Petition and therefore respectfully move for leave to file the accompanying brief as *amici curiae*.

Respectfully submitted,

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BRIEF AMICI CURIAE OF THE NATIONAL HOCKEY LEAGUE PLAYERS ASSOCIATION AND THE NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION IN SUPPORT OF PETITIONERS

Pursuant to Rule 37 of the Rules of this Court, this brief is respectfully submitted, in support of the Petition, by *amici curiae*, the National Hockey League Players Association ("NHLPA") and the National Football League Players Association ("NFLPA"). The consent of the parties to the filing of this brief has been requested. Petitioners have given consent; respondents have not.

INTEREST OF AMICI CURIAE

The NHLPA and NFLPA are the sole and exclusive collective bargaining representatives of players in, respectively, the National Hockey League ("NHL") and National Football League ("NFL"). Because the NHLPA and NFLPA are regularly engaged in multi-employer bargaining in professional team sports—a process that is being seriously undermined as a result of the decision below—the NHLPA, the NFLPA and their members have a substantial interest in the Court's resolution of the extremely important questions of antitrust and labor law policy presented by the Petition.

SUMMARY OF ARGUMENT

Unless the Petition is granted in this case, employees in unionized industries subject to multi-employer bargaining will be faced with a Hobson's choice: either decertify their unions or give up their antitrust rights. One of two paramount federal policies—the labor or antitrust laws—will thus be entirely ousted, rather than accommodated, in direct contravention of the decisions of this Court. The consequences will be particularly severe in the multi-billion dollar sports and entertainment industries, where antitrust rights are critical to protecting competition in labor markets in which unions generally try to preserve for their members the individual right to negotiate salaries established by marketplace forces.

Moreover, there is an immediate need for this Court to review the scope of the nonstatutory labor exemption in the absence of a collective bargaining agreement, since there is unlikely to be another case suitable for raising this important question any time in the near future. The reason is that union members faced with the combined deterrent of the *Brown* decision and the recent decision of the Second Circuit in *Williams v. National Basketball Association*, 45 F.3d 684 (2d Cir 1995), *pet. for cert. pending*, No. 95-137 (U.S. filed July

24, 1995) will not likely be able to endure the years of litigation that it would take to get this critical issue back before this Court. Rather, if such union members conclude that they wish to assert their antitrust rights, they are likely to simply decertify their unions—undermining the very labor law policies which the decision below purports to protect.

When the application of the nonstatutory labor exemption to employer-imposed restraints was last presented to this Court by the petition in *Powell v. National Football League*, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991), certiorari was denied (with two judges dissenting). Since that time, however, as the Solicitor General of the United States has pointed out, the decisions of the lower courts have departed even further from the rationale of the nonstatutory labor exemption and caused seriously adverse effects to labor and antitrust policies as a result. Indeed, the decertifications and lockouts which have occurred in professional team sports in recent years have stemmed in significant part from the failure of the lower courts, in decisions like *Brown* and *Williams*, to strike any accommodation between the antitrust and labor laws. It is time for this Court to restore that balance by granting the Petition and reversing the decision below.

ARGUMENT

I. UNLESS THE PETITION IS GRANTED, THE VASTLY EXPANDED NONSTATUTORY LABOR EXEMPTION CREATED BY THE LOWER COURTS WILL SEVERELY DAMAGE BOTH LABOR AND ANTITRUST POLICIES.

In 1965, this Court created the nonstatutory labor exemption to cover certain "union employer agreements" for the purpose of "accommodating the coverage of the Sherman Act to the policy of the labor laws." *Local No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 689 (1965); *see*

also United Mine Workers v. Pennington, 381 U.S. 657 (1965). Specifically, the limited scope of the nonstatutory labor exemption, as articulated by this Court, was to effectuate the objective Congress expressed in the statutory labor exemption—*i.e.*, to protect the legitimate organizing and bargaining activities of *unions* from the antitrust laws. As this Court later explained:

> The basic sources of organized labor's exemption from the antitrust laws are §§ 6 and 20 of the Clayton Act, and the Norris-LaGuardia Act. These statutes declare that labor unions are not combinations or conspiracies, in restraint of trade, and exempt specific union activities, including secondary picketing and boycotts, from the operation of the antitrust laws. They do not exempt concerted action or agreements between unions and nonlabor parties. The Court has recognized, however, that a proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the free competition in the business markets require that *some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions.*

Connell Constr. Co. v. Plumbers & Steamfitters Local No. 100, 421 U.S. 616, 621-22 (1975) (emphasis added, citations omitted).

For more than two decades, the lower courts adhered to the principles of *Jewel Tea* and *Pennington* and only applied the nonstatutory labor exemption in the context of existing union-employer agreements. In particular, the courts were careful not to permit the exemption to be used by employers as a shield for anticompetitive collusion against the will of their employees.[1] The result was an accommodation between

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[1] *See, e.g., Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977); *Smith v. Pro-Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978); *Kapp v. National Football League*, 390 F. Supp. 73 (N.D. Cal. 1974), *aff'd*, 586 F.2d 644 (9th Cir. 1978), *cert. denied*, 441 U.S. 907 (1979).

antitrust and labor law policies, which led not only to the preservation of antitrust rights, but also to new collective bargaining agreements and labor peace.

This careful balance between antitrust and labor policy was initially challenged by the decision of the Eighth Circuit Court of Appeals in *Powell v. National Football League*, 930 F.2d 1293 (8th Cir. 1989), *cert. denied*, 498 U.S. 1040 (1991). For, although that decision was rooted in the fact that the restraints at issue had previously been the product of union agreement, it permitted the nonstatutory labor exemption to protect the continuation of employer restraints after the collective bargaining agreement had expired.

As a result of the *Powell* decision, the players in the NFL had to choose between continuing the NFLPA as their union or asserting their antitrust rights. Specifically, before the 1987 NFL season, the NFLPA engaged in collective bargaining negotiations with the NFL Management Council ("NFLMC"), the multi-employer bargaining unit of the NFL clubs. Under the CBAs that were in effect during the ten years prior to the 1987 NFL season, only one NFL player had moved to another team at the expiration of his contract, even though thousands of players supposedly were eligible to do so under the "right of first refusal/compensation" player movement rules. The NFLPA attempted to negotiate a new CBA in which players would have the opportunity to market their services to NFL clubs without restriction at some point in their careers, but the NFLMC insisted that it would never agree to a CBA in which NFL clubs could freely bid for the services of NFL players. As a result, the NFL Players went on strike at the beginning of the 1987 NFL season. However, this economic weapon proved completely ineffective. After four weeks, during which the NFL used "replacement" players in games that were broadcast by the television networks, the players reported back to work without a new CBA.

Thereafter, the NFLPA and nine players commenced an antitrust class action against the NFL and its clubs, the *Pow-*

ell litigation, alleging that the continued use of various restraints on player movement by the NFL clubs, including the right of first refusal/compensation system, constituted violations of the antitrust laws. *Powell v. National Football League*, Nos. 4-87-917 (D. Minn.) (Doty, J.). The District Court held that the non-statutory labor exemption did not continue to protect the restraints after the expiration of the collective bargaining agreement and after a judicially recognized "impasse" had been reached in negotiations on this issue. *Powell v. National Football League*, 678 F. Supp. 777, 788 (D. Minn. 1988). However, a 2-1 panel of the United States Court of Appeals For The Eighth Circuit reversed.

Because of the *Powell* decision, the players either had to give up their collective bargaining rights under the labor laws, or submit to the system imposed by the NFL and its clubs. Given this choice, the players determined to give up their collective bargaining rights. Individual players then commenced antitrust suits against the NFL and its clubs to assert their rights under the antitrust laws. *See, e.g., McNeil v. National Football League*, No. 4-90-476 (D. Minn.).

The NFL clubs took full advantage of the absence of a collective bargaining representative for the players. Beginning with the 1989 season, the NFL clubs implemented "Plan B," which continued the right of first refusal/compensation system with only slight modifications; froze playoff money; froze injury protection pay for veterans and reduced it for rookies; froze termination pay; lowered minimum salaries; reduced life, health and dental insurance; froze expansion bonuses; and froze pre-season player per diems. Plan B also threatened to eliminate individual bargaining by players altogether (even though no union was in existence to bargain on behalf of the players) and to implement a leaguewide wage scale covering all players beginning with the 1993 season. For four NFL seasons, from 1989 to 1992, the players suffered these effects, without any collective bargaining or labor law rights.

In September 1992, after a three-month trial, a jury verdict was rendered in *McNeil* which determined that Plan B was an unreasonable restraint of trade in violation of § 1 of the Sherman Act. Subsequently, a class action suit was filed on behalf of all NFL players challenging continued implementation of Plan B or similar restraints on player movement. *See White v. National Football League*, No. 4-92-906 (D. Minn.). In January 1993, the NFL and its member clubs agreed to a global settlement of the *White* class action and other player suits challenging Plan B. It was only after this antitrust settlement that the NFL players were able to reconstitute the NFLPA as their union and resume collective bargaining negotiations which led to a new CBA.

While the NFL players suffered the adverse consequences of the Powell decision—being forced to abandon collective bargaining and all of their labor law rights for more than three years—other employees did not have to follow suit immediately because union agreement was still the touchstone of the nonstatutory labor exemption among the lower courts. The *Powell* decision itself endorsed the Eighth Circuit's previous decision in *Mackey*, which held that employers could not use the nonstatutory labor exemption to protect anticompetitive restraints that employers themselves had unilaterally thrust upon weak employees without ever having received the arm's length agreement of the employees' union. *See Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977).

This fundamental principle, however, was completely abandoned by the lower court decisions in *Williams* and *Brown*, which held that antitrust policy was completely ousted in any unionized industry in which multi-employer bargaining takes place. According to these decisions, employers in such industries enjoy antitrust immunity to impose the most blatant restrictions on labor market competition imaginable—without any existing or prior union agreement—unless the employees take the step of abandoning their collective bargaining rights.

The end result of these decision is clear: unless this Court grants the Petition, there will no longer be any accommodation of antitrust and labor law policy; one or the other will be completely ousted from entire industries. The basic tenets of *Jewel Tea*, *Pennington*, and *Connell* will thus be ignored, and a narrow, judicially-created exemption designed to further Congressional intent will end up subverting it.

Requiring union self-destruction as a condition for employees to assert their antitrust rights obviously is not supportive of federal labor law policies. Moreover, the decision below will further undermine these policies by making it less likely that employers engaged in multi-employer bargaining will bargain in good faith to reach a new collective bargaining agreement. Since, under the decision below, employers are immune from antitrust liability even if they unilaterally impose unreasonable restraints of trade which have *never* been agreed to by a union, there is no incentive for these employers to engage in the give and take that is necessary to reach a collective bargaining agreement. As Judge Wald notes in her dissent:

> [The majority's rule] decisively tips the balance by giving employers important *new* rights, together with new incentives to harden their bargaining positions. Because employers can now unilaterally impose labor market restraints that heretofore might have exposed them to antitrust liability, the majority's rule provides new incentives to raise the stakes in bargaining in hope of winning industry-wide labor market restraints that might never before have been attempted. It also encourages employer groups to hang tough on their demands, since at impasse they may be able to impose any bargaining proposals the employees have rejected without fear of antitrust liability.

Williams v. National Basketball Association, 45 F.3d at 1064 (2d Cir. 1995) (Wald, J. dissenting) (emphasis in original).

The recent chaos in professional basketball, in the wake of the *Williams* and *Brown* decisions, illustrates how the expansion of the nonstatutory labor exemption by the lower courts has wreaked havoc with both labor and antitrust policies. Prior to *Williams*, the NBA never experienced a work stoppage and always resolved its antitrust litigation with a long-term negotiated settlement and labor peace. By contrast, as a direct result of the decisions in *Williams* and *Brown*, the most recent round of collective bargaining in the NBA was conducted in a highly destructive environment, resulting in the first work stoppage in NBA history. Shielded under *Williams* with total antitrust immunity for whatever they might propose in bargaining, the NBA owners insisted upon acceptance of restraints more onerous than the NBA players had ever previously accepted. Although most NBA players were opposed to these restraints, they were unable to agree upon whether it was wise to give up their antitrust or labor law rights, and ended up divided in a bitter decertification election. Tellingly, the NBA employers campaigned to keep the union in place in order to provide the teams with antitrust immunity. The anomaly of employers fighting to keep a union in place in order to protect themselves dramatically illustrates how the decision below and in *Williams* have completely distorted the nonstatutory labor exemption.

Indeed, while the court below claims that the recent labor experience in the NHL demonstrates how collective bargaining can be successful in sports and entertainment industries without any antitrust protection for employees, the facts prove exactly the opposite proposition. Specifically, after the expiration of the last CBA in the NHL in September 1993, the NHL owners made it clear that they wanted a new "salary cap" to eliminate price competition for player services—a demand which the NHLPA and its members strongly resisted. The NHL owners, however, did not unilaterally impose a salary cap—even after an impasse in the negotiations has been reached—*because of the risk, prior to the Brown deci-*

sion, of antitrust liability.[2] Instead, the NHL owners resorted to a lock-out (a "tactic" not prohibited by the antitrust laws in a unionized industry) and a new CBA was eventually reached which did *not* include a salary cap. Contrary to the factual assumptions of the decision below, the collective bargaining process was able to work only because, prior to the *Brown* decision, the NHL owners believed that the antitrust laws prohibited them from simply imposing the new salary cap restraints they desired.

Finally, it is particularly important for this Court to review and clarify the scope of the nonstatutory labor exemption now, before further damage is done to antitrust and labor law policy in the numerous unionized industries in which multi-employer bargaining takes place. Absent review in either this case or *Williams*, it is unlikely that this Court will soon get another suitable opportunity to repair this area of judge-made law. The reason is that if *Brown* and *Williams* are not reversed, union members wishing to pursue their antitrust rights are most likely to simply decertify their unions, rather than face years of litigation trying to get this issue addressed by the Supreme Court. Similarly, there will be no vehicle for this Court to review the lost antitrust rights of union members who, unwilling to decertify, do not even try to assert their antitrust rights in court. The Petition herein thus presents the best opportunity for this Court to address these paramount issues of federal policy.

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[2] Harry Sinden, the President-General Manager of the Boston Bruins admitted publicly to just these antitrust concerns, stating that "[a]t the moment we have no plans to implement anything the way the baseball owners did. We don't have the (antitrust) protection they do . . . We do have the right to implement our final proposal, as long as the proposal is not (tantamount to) a restraint of trade." Joe Gordon, *NHLPA Eyes Suit; Owners May Hear Antitrust Charge*, *Boston Herald*, December 25 1994, at B24.

CONCLUSION

For all of the above stated reasons, as well as those stated in the Petition, this Court should grant certiorari to review the judgment of the Court of Appeals.

Respectfully submitted,

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